IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The majority and concurring opinions of the United States Court of Appeals for the Second Circuit, reported at 562 F.2d 130, appear as Appendix A to the petition for a writ of certiorari. The opinion of the concurring judge on a petition for rehearing, not officially reported, appears as Appendix D to the petition. The opinion of the United

States District Court for the Southern District of New York (Lasker, J.), reported at 400 F. Supp. 737, appears as Appendix B to the petition.

JURISDICTION

The judgment of the Court of Appeals, Appendix C to the petition, was entered on August 8, 1977. A timely petition for a writ of certiorari was filed, and this Court granted the writ on October 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. § 26 and 28 U.S.C. §§ 1331(a), 1337 and 1338(a).

QUESTIONS PRESENTED

The American Society of Composers, Authors and Publishers ("ASCAP"),* is an unincorporated membership association of composers, lyricists and publishers of copyrighted musical compositions. For 64 years, it has offered the "blanket" license to all those who wished to perform the music created by ASCAP's members—a "blanket" license being one by which the licensee, for a stated term and royalty, is authorized to perform any copyrighted work that ASCAP has the right to license. This same blanket license is offered by music performance rights societies in all nations of the world which recognize copyright. Since 1941, ASCAP has been required to offer such licenses by consent decrees with the Department of Justice in

* This brief is filed on behalf of ASCAP and the individual writer and publisher members of ASCAP who were named as defendants in the complaint filed in the District Court.

United States v. *ASCAP*, an antitrust case in the Southern District of New York.

At the same time, however, ASCAP's members are totally free to license their individual copyrights to CBS or any other individual user in individual negotiations, if asked. They are not only free, they are willing—they would, the District Court found, "line up at CBS's door" if only CBS expressed an interest (Pet. App. B, p. 85a*).

Nevertheless, the Court of Appeals for the Second Circuit, reversing a decision of the District Court, has held in this action:

(a) that the blanket license constitutes "price-fixing" and hence is *per se* illegal under Section 1 of the Sherman Act; and

(b) that ASCAP's members misused their copyrights merely by offering an ASCAP blanket license to CBS for its television network.

The Court of Appeals reached this result, we submit, only by expanding the *per se* doctrine far beyond the bounds sanctioned by this Court. It held the blanket license *per se* illegal after an eight-week trial had indisputably demonstrated that the blanket license is a reasonable accom-

* "Pet. App." citations refer to pages of petitioners' appendices to the petition for a writ of certiorari. "A." citations refer to the volumes and pages of the appendix to the briefs filed pursuant to the Court's order of November 6, 1978.

modation of the needs of copyright proprietors and television networks—and does not unreasonably restrain trade.

The questions presented are:

1. When individual sellers are willing and free to negotiate individual prices for their individual products in individual negotiations, does their simultaneous offer of a package of all of their products through a common sales agent at a negotiated price constitute "price-fixing" which is *per se* violative of Section 1 of the Sherman Act?

2. More particularly, even though ASCAP's members were willing and free to license their copyrights to the CBS television network in individual negotiations, if asked, did ASCAP and its members engage in "price-fixing," illegal *per se*, and did they misuse the members' copyrights, by offering CBS an ASCAP blanket license?

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

STATEMENT OF THE CASE

The Parties

CBS

This case was brought by CBS on behalf of its television network. Operation of that network—which supplies programs to some 200 local television stations—is not, of course, CBS' only activity. CBS owns local television stations in five principal markets—New York, Los Angeles, Philadelphia, Chicago and St. Louis. It owns fourteen local radio stations in major cities, and its radio network has affiliation agreements with approximately 250 local radio stations. CBS Records is the largest manufacturer and seller of records and tapes in the world. CBS is a leading music publisher; indeed, it has publisher subsidiaries which belong to ASCAP and Broadcast Music, Inc. ("BMI") (the other major American performing rights licensor, petitioner in No. 77-1578). As the District Court found, CBS is the "No. 1 outlet in the history of entertainment" and "the giant of the world in the use of music" (Pet. App. B, pp. 27a-28a, 90a, 93a; Court Exhibit ("CX") 2, 20A. pp. E1-E10; 8A. p. 1792).

Such is the agglomeration of economic power which

here casts itself in the role of victim.

ASCAP

ASCAP is an unincorporated association of creators and publishers of music (CX 2, 20A. p. E4; 8A. p. 1792).

Prior to the organization of ASCAP in 1914, there was no effective method by which individual writers and publishers of music in the United States could obtain payment for the performance of their copyrighted works. The users of music—in 1914 principally theaters, dance halls, restaurants and taverns—were so numerous and widespread, and each instance of use so fleeting, that no individual writer or publisher could either negotiate licenses with the users or detect unauthorized uses and secure redress. Equally, users who wished to perform a great many compositions without infringing had no practical means of obtaining lisenses from the copyright proprietors (Pet. App. B, pp. 25a-26a).

ASCAP was organized as a means of bringing copyright proprietors and users together, to serve as a kind of clearinghouse for the licensing of music performance rights (*Id.*).

The music world has changed drastically since 1914. Broadcasters—radio and television stations and networks—are today the largest users of music. As these new users have come along, ASCAP has offered its members' works to them—while continuing to license the more traditional users (Pet. App. B, p. 26a).

ASCAP today has 16,000 writer and 6,000 publisher members (*Id.*); it licenses also on behalf of the hundreds of

thousands of members of some 30 affiliated foreign societies. The affiliated foreign societies license for ASCAP members in their countries (CX 2, 20A. p. E4; 8A. p. 1792).

ASCAP's members include Samuel Barber, Leonard Bernstein, Aaron Copland and Morton Gould among serious composers, and such popular composers and lyricists as Irving Berlin, Hoagy Carmichael, John Denver, Bob Dylan, Roberta Flack, Carole King, Richard Rodgers, Carly Simon and Stevie Wonder. And it represents the estates of deceased members, among them Bela Bartok, George M. Cohan, Duke Ellington, W.C. Handy, Oscar Hammerstein II, Victor Herbert, Cole Porter and John Philip Sousa.

The conditioning circumstance of ASCAP's existence today is the Amended Final Judgment entered on consent in 1950 in *United States* v. *ASCAP,* [1950-51] Trade Cas. (CCH) ¶62,595 (S.D.N.Y. 1950) (amending a 1941 consent judgment). That judgment controls virtually every aspect of ASCAP's internal and external operation.

Under the Amended Final Judgment and the ASCAP Articles of Association and membership agreements:

(a) membership in ASCAP is open to any writer of one published song and to any music publisher; hence, all writers and publishers are guaranteed access to the markets where music is licensed;

(b) each member grants to ASCAP only the *nonexclusive* right to license public performance of compositions

created or published during the term of membership; the right arises at the instant of creation or publication;

(c) the member retains the right to license directly, and ASCAP is forbidden to interfere with that right;

(d) no user may be denied an ASCAP license—indeed, a user obtains an ASCAP license by the very act of applying for one; and

(e) ASCAP is required to offer users the "blanket" license, which gives the user the right to perform all of the compositions in the ASCAP repertory, as often as desired, upon payment of one fee (Pet. App. B, pp. 29a-32a; CX 2, Ex. 9, 20A. pp. E84-E88; 8A. p. 1792; CX 2, Ex. 10, 20A. pp. E124-E138; 8A. p. 1792).

Blanket licenses are used throughout the world by performance rights societies in all countries which recognize copyright. The prime virtues of the blanket license are convenience, unlimited choice of compositions in the repertory, and freedom from concern about infringement. Users have unlimited access to all the copyrighted compositions written by members of the licensing society and of affiliated foreign societies—without the need to seek licenses from individual copyright owners (Pet. App. B, p. 26a).

The Amended Final Judgment requires ASCAP also to offer broadcasters a variant of the blanket license, the "per program" license. Here, too, the broadcaster has unlimited access to the ASCAP repertory but, instead of paying one fee for the entire license period, the per program licensee

pays a fee only for each program in which ASCAP music is performed* (Pet. App. B, pp. 29a-30a).

ASCAP's fees for all of its licenses are regulated by the Amended Final Judgment: if a user is dissatisfied with a fee quoted by ASCAP and an agreement can not be negotiated, the user has the right to have the District Court for the Southern District of New York determine a "reasonable fee." In any such proceeding, ASCAP—not the user—bears the burden of proving the reasonableness of the fee it requests (*Id.*).

ASCAP is in essence a cooperative. After deducting its operating expenses, it distributes all revenues among its members and affiliated foreign societies (Pet. App. B, p. 27a). Distribution arrangements comply with the mandate of the Amended Final Judgment that ASCAP

> "distribute to its members the monies received . . . on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP." (CX 2, Ex. 10 ¶XI, 20A. pp. E133-E134; 8A. p. 1792).

Thus, members receive royalty distributions only when

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* As a matter of precise fact, the Amended Final Judgment requires ASCAP to issue only a per program license; ASCAP is "enjoined" from issuing a blanket license unless the broadcaster so requests (Pet. App. A, p. 7a).

Hence, CBS and every other broadcaster which has taken an ASCAP blanket license has done so only as a result of its own voluntary act, to satisfy its own preference.

their compositions are performed. There is no reward for the non-productive or the inefficient.

ASCAP is governed by a board of 24 directors, half elected by the writers, half by the publishers (9A. pp. 2411-12).

To sum up: the present ASCAP system for licensing music performing rights, as governed by the Amended Final Judgment

—guarantees that each broadcaster or artist wishing to perform ASCAP music may do so (and guarantees, accordingly, that the public may hear that music);

—guarantees that the user may obtain judicial determination of the reasonableness of the fee he shall pay, if he can not negotiate a satisfacory fee with ASCAP;

—guarantees the right of users to negotiate individual prices directly with copyright proprietors; and

—guarantees to the creators of music the opportunity to be rewarded in accordance with the use of their works.

BMI

BMI is a nonprofit corporation organized in 1939 by the radio broadcasting industry, including CBS, to act as a music copyright licensor. It is not a cooperative as is ASCAP—its stock is owned entirely by broadcasters (although CBS sold its shares back to the corporation in 1959). It has approximately 20,000 writer and 10,000 publisher affiliates and, according to the District Court's calculations,

a repertory of over one million compositions as compared with ASCAP's over three million (Pet. App. B, p. 27a).

BMI, too, operates under an antitrust consent decree, the particulars of which we may leave for discussion by BMI (Pet. App. B, p. 32a).

As a practical matter, the trial court found, virtually every copyrighted composition is in the repertory of either ASCAP or BMI (Pet. App. B, p. 27a). In consequence, a broadcaster or other user holding blanket licenses from both organizations may freely perform whatever music his taste and interests may suggest.

Since CBS here contends that the blanket license is *per se* unlawful, it may be noted that, when CBS and the other broadcasters established BMI in 1939, they agreed to take blanket licenses from it (Pet. App. B, p. 51a).

Relations between the Parties

CBS and ASCAP have dealt with each other for almost half a century—beginning in 1929 when CBS took an ASCAP blanket license for a radio station (Pet. App. B, p. 51a). When the CBS radio network was established, it sought and obtained an ASCAP blanket license (13A. p. 3610).

CBS first took an ASCAP blanket license for its television network in 1946 (Pet. App. B, p. 51a). In 1949, when television began to show signs of serious commercial significance, the broadcasting industry, including CBS, *in-*

sisted that ASCAP continue to offer the blanket license (13A. p. 3610).

Although, as we noted earlier, the Amended Final Judgment requires ASCAP to offer broadcasters a per program license, and bars offering of a blanket license unless the broadcaster requests one, CBS has always sought and obtained blanket licenses for all of its operations, never a per program license. Nor has the District Court ever been required to set a fee for an ASCAP-CBS license of any kind—the parties were always able to negotiate satisfactory terms (Pet. App. B, p. 51a).

CBS purports to find evil in the fact that, under the blanket license, the fee does not vary with the licensee's use of music. This is of course true: it is the essence of the blanket license that the licensee pays a set fee for unlimited *access*, and may perform ASCAP music as often as he wishes without variance in the fee. This is the arrangement the licensee chooses when he opts for the blanket license in preference to per program or direct licensing. It is true also, however, as the trial court found, that

> "the only evidence on the point indicates that the extent of CBS' music usage has always been a significant factor in negotiations for the fee paid in renewals of CBS' blanket license" (Pet. App. B, p. 115a n.22).

Such was the history of relations between the parties as of December 31, 1969, when the CBS television network blanket license came to an end. On that date, CBS filed the present action in which it demands an injunction requiring ASCAP to offer something never used in music licensing anywhere in the world and never even reduced to

writing, the so-called "per use" license (Pet. App. B, pp. 24a-25a).

CBS' action was, to say the least, somewhat abrupt. As the District Court found—and let us here note that the Court of Appeals accepted the District Court's findings in their entirety and commended Judge Lasker for their clarity (Pet. App. A, p. 2a)—"Neither the history of the relationship between the parties nor the events leading to this action remotely suggest that CBS has been compelled to take a blanket license it did not want" (Pet. App. B, p. 53a). And "CBS has made no effort to obtain the kinds of licenses it now complains defendants are unwilling to grant" (Pet. App. B, pp. 50a-51a).

Rather, the fact was that a new vice president, Donald Sipes, arrived on the scene at CBS in 1969; he was, said the District Court, "almost completely unacquainted with the intricacies of music licensing" (Pet. App. B, pp. 53a-54a). Sipes testified that he disliked the blanket license as soon as he saw it; he quickly decided to explore alternatives. He consulted only one man who had the slightest familiarity with music, one Poklitar, who was in charge of clerical personnel processing music logs. Said the District Court kindly, "Poklitar is not a business man and his duties involve a narrow portion of the music licensing spectrum" (Pet. App. B, p. 54a).

Neither Sipes nor anyone else at CBS spoke with any copyright owner, any television program producer or anyone else who might possibly know something about the

realities of music licensing. Sipes did not even discuss the subject with any other CBS executive (Pet. App. B, p. 54a).

Sipes did not testify that ASCAP ever refused to discuss any particular form of license. Neither Sipes nor anyone else at CBS ever attempted to obtain a license from an ASCAP member in direct negotiation (Pet. App. B, p. 80a) —Sipes never so much as talked with a composer, a lyricist or a publisher (Pet. App. B, pp. 81a-82a). CBS made no feasibility study of whether it could supply its music needs through direct licensing; it never studied what a "per use" license might look like, whether it could possibly work, or whether a blanket license might be preferable (Pet. App. B, p. 54a).

What Sipes did was to talk to two CBS in-house lawyers, and he discussed only legal matters with them, not business reality (Pet. App. B, p. 54a). Without further ado, CBS filed this action.

As the District Court said (Pet. App. B, p. 112a):

> "We are left with the strong impression that CBS has exaggerated the risks involved in dropping its blanket license and sought a legal solution to what is essentially a business problem."*

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* CBS continues to rely on legal solutions to business problems: After the Court of Appeals rendered its decision in this case, CBS cancelled its license under the Amended Final Judgment, it has made no payment whatsoever to ASCAP, and it continues constantly to perform ASCAP music.

Proceedings Below

The District Court

The complaint filed by CBS tracked and relied heavily on this Court's then-recent decision in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969). CBS alleged that ASCAP and BMI had violated the antitrust laws because the licenses available from both licensing organizations "compel[led]" the CBS television network to pay for music it did not want and because each licensing organization was "using the leverage inherent in its copyright pool to insist that [CBS] pay royalties on a basis which does not bear any relationship to the amount of music performed." (Pet. App. B, p. 33a).

By way of relief, the complaint sought an injunction requiring each licensing organization to grant the CBS television network a "per use" form of license (Pet. App. B, p. 25a).

Thus, the essential claim tendered by CBS was that it was *compelled* to deal with ASCAP. But, as we have seen, the licensing rights which ASCAP obtains from its members are nonexclusive. Therefore, in theory, at least, neither the CBS television network nor any other user is compelled to deal with ASCAP: any user may ignore ASCAP and negotiate licenses with the members.

In consequence, the principal issue tried before the District Court was whether CBS, as a practical matter, could

obtain the licenses it desired directly from ASCAP's members. Although CBS had never approached even one ASCAP member for a direct license, it sought to prove that any such effort would be futile—ASCAP members would refuse to license directly. That being so, said CBS, the blanket license should be condemned as block-booking and price-fixing.

The outcome of the trial is not in dispute: the evidence destroyed CBS' factual contentions. After eight weeks of trial at which the industry was studied in every detail, undisturbed findings of fact by the District Court established that CBS *could* acquire the licenses it wished in direct negotiation with ASCAP members, and that ASCAP's members *would* compete on a price basis for individual compositions if CBS would only ask.*

Judge Lasker's findings were explicit (Pet. App. B, pp. 111a-112a, 115a, 117a, 119a-120a):

> "CBS has [not] . . . established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license.
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> • • •
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> "CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them.
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> • • •
>
> "CBS has failed to establish that the members or affiliates of ASCAP or BMI have refused or would refuse to license their compositions on a direct licensing basis, or otherwise used their collective leverage to compel CBS to license rights to music which it did not wish to license.
>
> • • •
>
> "CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses . . . [C]ertainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place."

Each of these findings was preceded by an extensive discussion of the testimonial and documentary evidence which supported it, including a lengthy analysis of the fashion in which CBS used music and the methods by which CBS could license this music directly from copyright proprietors. In addition, the District Court, in painstaking detail, discussed the evidence relating to alleged "obstacles" to direct licensing suggested by CBS—and rejected

* CBS tried and tried to prove that copyright owners would refuse or would at least be "disinclined" to give direct licenses to the network. No credible proof was forthcoming. Only one witness testified that a publisher for whom he worked would probably refuse to grant licenses to CBS. And that testimony is incredible rather than persuasive: the witness worked for publishers *owned by CBS* (Pet. App. B. p. 90a). The District Court, by contrast, relied on such testimony as this by publisher Edwin H. Morris (Pet. App. B, pp. 85a-86a):

> "Q. Let us assume that telephone does ring, that you are approached by producers and/or network people who are interested in obtaining direct licenses to the compositions or various of the compositions in the Morris catalog. Do you talk to these people?
>
> "A. Yes.
>
> "Q. Do you invite them to come into your office?
>
> "A. I will even go to theirs."

all claims that there were any such "obstacles" (Pet. App. B, pp. 61a-79a, 111a-112a).

Since none of the District Court's findings was disturbed on appeal, we need not discuss the evidence.

Turning to the legal issues, the District Court wrote (Pet. App. B, p. 40a):

> "In support of its contention that ASCAP and BMI are illegal combinations merely because they offer blanket licenses, CBS cites cases in which sellers agreed among themselves as to the prices to be charged buyers for their products. See, e.g., United States v. Socony Vacuum Oil Co., Inc., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The cases are inapposite. Unlike the plaintiffs in the cited cases, CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them. It makes the very different claim that a combination of individual sellers offering the entire pool of their products through a common sales agent at a negotiated package price is per se illegal, regardless whether the sellers are willing to sell their products on an individual basis."
>
> "The claim fails as a matter of law."

The District Court's conclusion that CBS' claim failed "as a matter of law" was premised on its reading of two decisions of this Court, *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950); and *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S.

100 (1969). To the District Court, these cases teach that "[T]he critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor" (Pet. App. B, p. 43a).

Since there was no compulsion in the blanket license which ASCAP made available to CBS on its own request, since CBS had a free and real choice between dealing with ASCAP and dealing with the individual members, the District Court dismissed the complaint.

The Court of Appeals

The Court of Appeals accepted every finding of fact made by the District Court in its 46-page opinion. On the central issue tried by the District Court—whether CBS, if it so chose, could deal directly with ASCAP's members and obtain music performance rights without an ASCAP blanket license—the Court of Appeals concluded (Pet. App. A, p. 10a):

> "Suffice it to say that our review leads us to the conclusion that the essential finding of the District Court that such a market *can* exist is not clearly erroneous" (emphasis in original).

Given this proven absence of coercion, the Circuit Judges agreed with Judge Lasker that claims of illegal tie-in and block-booking had no merit (Pet. App. A, p. 11a).

But a majority of the Court of Appeals (Judge Gurfein and the late Judge Anderson) then held that the mere offering of a blanket license by ASCAP—even though ASCAP's members were willing to deal individually and though ASCAP was required to offer blanket licenses by

the Amended Final Judgment—was an act of "price-fixing" as a matter of law, and so illegal *per se.* (Judge Moore, in an opinion termed a concurrence, refused to agree that the blanket license was "price-fixing" [Pet. App. A, p. 23a].)

Disregarding the realities of the music business as revealed in the lengthy trial record and found by the trial court, the majority reached this conclusion (Pet. App. A, pp. 11a-12a):

> "The charge that there is a restraint of trade by price-fixing is founded upon the conception that when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition. But even if the single price is *reasonable,* the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition. His distributive share of the common royalties may be greater than the royalty he would receive in a free market. In such case, even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940).
>
> "There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his *own particular* composition, ..." (footnotes omitted) (emphasis in original).

The majority offered this further explanation (Pet. App. A, pp. 20a, 22a):

> "[T]he very availability of the blanket license itself involves the fixing of a collective price which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete.
>
> * * *
>
> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete" (emphasis in original).

In the interest of coherent presentation, we may perhaps interrupt at this point to suggest that, in ruling the blanket license *per se* illegal, the majority in the court below made two basic errors:

First, it ignored the many decisions of this Court holding that the legality of a joint selling agency is to be determined by the rule of reason—even when the participants do *not* stand ready to deal as individuals. The fact that a joint selling agency sells at a set price does not constitute "price-fixing" and *per se* illegality.

Second, the court below took as its touchstone the proposition that "the individual copyright owner . . . [may] *choose* the blanket license as his medium of licensing in preference to individual bargaining" (Pet. App. A, p. 20a) (emphasis in original). Were that true, the court might per-

haps have some theoretical support for its conclusion that "[t]he blanket license dulls his incentive to compete" (Pet. App. A, p. 20a) (although theory would still fall in the face of the District Court's findings that ASCAP members "would wait at CBS' door" and "compete with each other on a price basis" if only CBS would ask). But the precise opposite is true—it is the user, such as CBS, not the ASCAP member, who chooses whether to deal with ASCAP or the member. Only if CBS decides to approach ASCAP may ASCAP offer a blanket license. If CBS chooses to ignore ASCAP and approach the individual member, there is no way in the world that the member can "*choose* the blanket license as his medium of licensing in preference to individual bargaining."*

Having thus found price-fixing where price-fixing had never been seen before, and having extended the concept

* The court below made a third basic error if it meant to suggest that the blanket license "includes compensation even for those in the combination whose wares are not used" (Pet. App. A, p. 11a). Under the Amended Final Judgment, ASCAP's distributions are divided equally between publishers and writers. Publishers receive royalty distributions on the basis of performances only. Composers and lyricists have the right to elect to have distributions (a) based solely on performances, or (b) based on performances and additional factors, including the recognized status of their works, the member's average performances through the years and the number of years in which the member has had performances (*See* CX 2, Ex. 11, 1960 Amended Final Judgment, Section III(A) and Part I of Attachment A., 20A. pp. E143-E144, E156-E159; 8A. p. 1792. *See also* 9A. pp. 2481, 2512-20). Thus no ASCAP member receives a distribution if his works have not been performed.

It is perhaps worth noting that, under the weighting rules which ASCAP has adopted with the approval of the District Court administering the Amended Final Judgment, all performances do not earn the same credit. For example, the music director of a show such as the "Tonight" show or "Captain Kangaroo" is limited in the number of performance credits he may earn by performing his own works. And "serious" music is encouraged through a performance weighting system that rewards its composers more generously than composers of popular music. (CX 2, Ex. 11 and attachments thereto, 20A. pp. E139-E208; 8A. p. 1792; 9A. pp. 2481, 2515-20.)

of *per se* illegality beyond all prior bounds, the majority abruptly did an about-face and created a new defense to price-fixing. It ruled that a common selling agency with a single price might be saved from *per se* illegality by "market necessity." The court did not find it necessary to resolve the incongruity in traditional terms between *per se* illegality and "market necessity" justification: here, said the majority, there was no "market necessity" for the blanket license because, as the District Court found, direct dealing between CBS and ASCAP members was entirely feasible.

And so ASCAP and its members, by reason of their making the blanket license available to CBS, were guilty of price-fixing. Their problems did not end there: in a footnote, the court said: "We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim" (Pet. App. A, p. 23a n.29).

This footnote would seem to pose the most deadly threat to the enforceability of the copyrights of ASCAP's 16,000 writer and 6,000 publisher members, and threaten also the copyrights of the 30 foreign societies which have licensed through ASCAP.*

The liability of ASCAP and its members thus resolved, the court did another turnabout. Instead of enjoining the *per se* illegal blanket license, the court said (Pet. App. A, pp. 22a-23a):

> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required

* CBS has advised ASCAP that, if it is sued for infringement of any ASCAP-licensed copyright, it will defend with a claim of "misuse."

to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing.

"We reverse the judgment dismissing the complaint and remand to the District Court for further proceedings in accordance herewith" (footnotes omitted).

The *per se* illegal blanket license could, then, perhaps still be saved if the District Court could fashion "some form of per use" license to be issued by ASCAP. The Second Circuit did not explain why a per use license, with ASCAP setting the rates, would be any the less "price-fixing" than a blanket license—nor why, if the members set the rates, the per use license would offer anything more than, or different from, that which the individual members offer today in direct bargaining.

SUMMARY OF ARGUMENT

The court below erred in the following respects:

(a) it held to be "price-fixing" conduct which had never before been so perceived, announcing a theory so unlimited in scope as to make virtually any cooperative or joint economic activity with any impact on price illegal *per se*;

(b) it applied the label of *per se* illegality based on assumptions of fact contradicted by the undisturbed findings of the District Court;

(c) it set at naught the entire concept of *per se* illegality by creating a "market necessity" exception; and

(d) it directed the District Court to develop a "per use" license which shares whatever *per se* problems the blanket license may have.

ARGUMENT

I

ASCAP's BLANKET LICENSE IS NOT "PRICE-FIXING" AND IS NOT *PER SE* ILLEGAL

It has long been a fundamental tenet of the antitrust laws that *per se* rules are not matters of dogma, proclaimed by authority and accepted on faith. Rather, they come into being when experience and economic analysis combine to make it clear that the conduct under review is so harmful and so lacking in redeeming virtue that it should be categorically prohibited.

Ignoring such tests, making no such inquiry, the court below viewed ASCAP and all other common sales agencies as falling within the ban of *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), that "[a]ny combination which tampers with price structures" is illegal *per se*.

ASCAP, we submit, does not tamper with price structures in any way. And even those common sales agencies which may fairly be said to restrict competition have always been judged by the rule of reason rather than being held *per se* illegal.

Socony-Vacuum

Socony-Vacuum involved, of course, a classic instance of price-fixing and price-tampering—a combination of gas

marketers who agreed to maintain prices by buying up gasoline which would put downward pressure on prices if it ever got to market.

Its facts could hardly be more remote from those with which we are involved here. Even if we focus on the bare quoted language, it is clear that *Socony-Vacuum* is of no pertinence—in making the blanket license available, ASCAP and its members do not tamper with price structure and do not engage in price-fixing. For it is the essence of price-fixing that the price-fixers "fix"—that they agree either (a) to observe the established prices and not to compete with each other in price terms, or (b) to engage in conduct, as in *Socony-Vacuum*, the purpose and necessary effect of which is to fix and maintain prices. ASCAP's members undertake no such commitment nor do they engage in any such conduct. As the District Court found, ASCAP was not organized to fix or maintain prices, it "was organized as a 'clearing house' for copyright owners and users" (Pet. App. B, p. 26a). Nor may it be said of the offering of a blanket license that its purpose and necessary effect are anticompetitive—not when (a) the blanket license may be offered only when the user so chooses; (b) CBS and all other users have so regularly sought its benefits; and (c) the District Court has found that ASCAP's members are quite willing to negotiate individual prices quite apart from the blanket license, if only CBS will ask them.

In reaching its result, the Second Circuit did not cite and seemingly did not consider this Court's teaching in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977), decided almost two months earlier:

> "*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive."

Nor did the majority below mention the decision on which *Continental T.V.* drew for its delineation of the circumstances justifying *per se* treatment, *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958), which said:

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

This test was reaffirmed last Term in *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355, 1365 (1978), where the Court said that agreements may be held illegal *per se* only when their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."

Clearly, by these standards, the blanket license does not qualify for condemnation under *per se* rules. For not only is the blanket license not "plainly anticompetitive"—here, we have had an eight-week "elaborate study of the industry" which has resulted in the conclusion that, tested by the rule of reason, the use of the blanket license is lawful.

This careful study was, we may say, entirely appropriate and necessary for, as the Court of Appeals said, the music licensing business is like no other, it is "*sui generis*" (Pet. App. A, pp. 3a-4a). That very *sui generis* quality would seem to argue, however, that the courts should go

slow in developing new *per se* rules for application in this complex field.

Common Sales Agencies

The court below evidently regarded its ruling as having impact far beyond the music-licensing business. Said the court (Pet. App. A, p. 11a):

> "The charge that there is a restraint of trade by price-fixing is founded upon the conception that when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained."

But common sales and buying agencies and other arrangements among competitors which, by contrast with ASCAP's blanket license, really do affect or eliminate competition—*e.g.*, where members of a selling group do not sell individually—have regularly been held subject to the rule of reason, rather than *per se* illegal, and they have regularly been held lawful. *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960); *United States* v. *Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953); In re *Associated Greeting Card Distributors*, 50 F.T.C. 631 (1954); *see* R. Bork, *The Antitrust Paradox* 263-7 (1978); L. Sullivan, *The Law of Antitrust* 207-8 (1977).

Ironically, one of the common selling and buying agencies threatened by the Second Circuit's ruling here is the

CBS television network itself. In functional terms, the network is a pool of approximately 200 affiliated local stations which sell their broadcasting facilities collectively through CBS. The network buys programs for these 200 station and sells advertising time for them. The network—not the individual station—acts as buyer and seller and negotiates the package fees. If ASCAP's blanket license is unlawful despite the members' willingness to negotiate individually, then equally unlawful are CBS' operation and the operation of the other national networks, despite the contractual freedom of the affiliated local stations to refuse a network program and to deal directly with an advertiser or a program supplier.

Automatic Radio and Zenith

The District Court here held that *Automatic Radio Manufacturing Co., Inc.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950); and *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), read together, teach that package licensing agreements are lawful when made for the convenience of the parties, without coercion (Pet. App. B, pp. 40a et seq.).

The court below held these decisions inapposite. It claimed to find a distinguishing feature in the fact that "these were cases in which a single trader, Hazeltine, owned and licensed all the patents involved"—by contrast with ASCAP, which licenses on behalf of its many members, who separately own their own copyrights (Pet. App. A, p. 17a).

This is a distinction without a real difference: surely Hazeltine, like any holder of hundreds of patents, must

have acquired them by assignment from the original inventors. Moreover, it would make no sense, economic or legal, to penalize ASCAP and its members for the fact that the members retain the right to license their copyrights individually.

Further, the attempted distinction would not apply to BMI, since BMI is an independent middleman in which writers and publishers play no management role—it is a "single trader," quite analogous to Hazeltine. It would be extraordinary indeed if, on this basis, BMI's licensing were to be held lawful and ASCAP's *per se* illegal—when BMI is totally owned by the broadcasting industry.

Let us consider still another demonstration of the illogic inherent in the attempted distinction of *Automatic Radio* and *Zenith*. We may envisage two ways in which a package of copyrights or patents may be licensed: the package license may be the only method of licensing, as was true in *Automatic Radio* and *Zenith*. Or it may be a nonexclusive method, with the user having the option to deal directly with the individual copyright proprietors, as is the case with ASCAP. Surely the nonexclusive basis, under which direct dealings are feasible, enhances competition. Yet the majority in the court below reached the opposite conclusion. It held that when the package license is simply a convenience, available to CBS if it chooses to follow that licensing route, the ASCAP license is *per se* illegal.

In our submission, the attempted distinction of *Automatic Radio* and *Zenith* fails—these cases make it clear, as the District Court here held, that the difference between

lawful and unlawful package licensing is coercion. And since ASCAP does not coerce, its blanket license is lawful.*

These cases are fatal also to the claim made here by CBS that there is something inherently bad in the fact that, under the ASCAP blanket license, the user pays for and receives the right to perform millions of compositions when he may use only hundreds or thousands—CBS often wails that it thus pays for music it does not use. In point of fact, of course, it is the right to choose for which CBS pays—CBS may no more complain than may one who goes to a smorgasbord restaurant and can't eat everything he can see. *Automatic Radio* and *Zenith* make this clear; there Hazeltine licensed over 500 patents and a typical user such as Zenith used only a handful, *see Hazeltine Research, Inc.* v. *Zenith Radio Corp.*, 388 F.2d 25, 33 (8th Cir. 1967), but a blanket license was held permissible provided there was no coercion.

K-91

The majority decision below is in direct conflict with *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). There, ASCAP members sued a radio broadcaster for copyright infringement and won. Defendant argued that ASCAP was an unlawful price-fixer; the Ninth Circuit disagreed.

The Second Circuit, in the case at bar, said that it had no quarrel with the Ninth Circuit's "result" in *K-91*—

* The *Harvard Law Review* is in accord: "the district court was fundamentally correct in viewing the question as one of coercion, focusing on the viability of the direct licensing option for CBS." Note, *The Middleman as Price Fixer*, 91 Harv. L. Rev. 488, 495 n.39 (1977).

there was a "market necessity" for the blanket license in the case of the K-91 radio broadcaster, said the majority below, and so the "price-fixing" by ASCAP in the blanket license could be justified (Pet. App. A, p. 21a n.26).

But that is not the route which the Ninth Circuit took. The Ninth Circuit said, rather, that ASCAP did no "price-fixing": since the ASCAP offer of a blanket license was subject to judicial determination, under the Amended Final Judgment, of the reasonable fee for that license, ASCAP was not the "price-fixing authority." The Ninth Circuit wrote, 372 F.2d at 4:

> "ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority."

The Ninth Circuit held on still another score that ASCAP's conduct was lawful, 372 F.2d at 4:

> "There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved."

In commenting on *K-91*, the majority below ignored the second rationale of the Ninth Circuit, and said of the first that it did not think

> "that the determination of 'reasonableness' of the price by a *court* saves the price that has been fixed by a combination from continuing to be an unlawful device in restraint of trade, absent the justification of market necessity" (emphasis in original).

In espousing this view, however, the Second Circuit made two analytical errors:

First, it equated ASCAP's offer of a license fee in a rate-making proceeding under the Amended Final Judgment with the "fixing" of a price for an ASCAP license.

Second, it paid no heed to the findings of the District Court that ASCAP's blanket license does not restrain trade because of the willingness of ASCAP's members to deal directly.

As the Ninth Circuit pointed out in *K-91*, 372 F.2d at 4:

> "ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly."

• • •

There is no basis then, in either authority, logic or the evidence, to hold it illegal *per se* for ASCAP to offer a blanket license to the CBS television network. It is rather an act to be viewed by the light of reason; the District Court having found it to be reasonable, it is lawful.

II

THE "MARKET NECESSITY" EXCEPTION DESTROYS THE *PER SE* RULE AND THE "PER USE" LICENSE IS AS ILLEGAL AS THE BLANKET

Having taken *per se* illegality into areas entirely new, the majority below suddenly pulled back and decreed that there is a "market necessity" exception to the rule that price-fixing is *per se* illegal.

This is, we submit, a contradiction in terms: when we say that arrangements are *per se* illegal, we mean that we will hear no justification for them—neither the "market necessity" for a kind of license nor the "reasonableness" of a fixed price.

The court below apparently was driven to this logical inconsistency by two considerations. First, it had to recognize that in some circumstances—dance halls, restaurants, small radio stations such as K-91—individual direct licensing can not possibly take place and so the blanket license is indispensable.* Second, it doubtless desired to harmonize its decision with the views expressed by the Ninth

* As the court pointed out (Pet. App. A, p. 21a n.26): "Indeed, CBS concedes that market necessity would probably justify ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations."

Circuit in *K-91* and by the Solicitor General when that case was before this Court on petition for certiorari. The Solicitor General then advised this Court of the Government's view that ASCAP's offering of a blanket license to a radio broadcaster was to be judged "in the light of economic realities," and was, in that light, reasonable. Memorandum of the United States as *Amicus Curiae* at 10-11 (No. 67-147, 1967 Term).

But if the blanket license is indispensable and so permissible in some circumstances, then, as the *Harvard Law Review* has pointed out, "it is not inherently harmful at all." Note, *The Middleman as Price Fixer*, 91 Harv. L.Rev. 488, 497 (1977). And that being so, it may not be termed illegal *per se*. Rather, it is to be tested by the rule of reason. Indeed, the creation of the "market necessity" exception is an admission that *per se* treatment is wholly inappropriate.

The Yale Law Journal perceived another problem in the "market necessity" exception. Said a Yale casenote, CBS v. ASCAP: *Performing Rights Societies and the Per Se Rule,* 87 Yale L.J. 783, 799 (1978):

> "The market function exception created in *CBS* threatens to swallow the per se rule. The exception to the per se rule would force the courts to examine the anatomy of the market in every case where the defense is raised, thus defeating the simplifying purpose of per se rules."

The majority below apparently recognized this problem and, in a footnote, sought to "narrow" the "market necessity" defense it was creating by saying (Pet. App. A, p. 16a n.22): "it is difficult even to imagine another in-

dustry where such a 'market necessity' defense would be applicable."

It may be difficult to imagine another industry, but it is not at all difficult to imagine hundreds of lawyers eager to assert that their clients' conduct is justified by "market necessity"—and to demand that the issue be tried.

As we have seen, the majority below, having held the television network blanket license *per se* illegal, and having held that no "market necessity" justification existed, still sought to preserve this much-maligned creature. The blanket license might exist, said the Court of Appeals, if only the District Court would fashion "some form of per use" license to be offered by ASCAP. The majority below did not indicate how this "per use" license would be any the less "price-fixing" than the blanket license. And CBS has resolved any uncertainty. In its brief in opposition to the petitions of ASCAP and BMI for certiorari, CBS noted that petitioners were contending that "the per-use system . . . would represent a 'classic' case of price-fixing." Said CBS candidly, "Of course that is true, and for precisely the same reasons that the present system is price-fixing . . . ." (Brief for the Respondent in Opposition at 37-8).

So to legitimatize one arrangement which is *per se* illegal, the majority below would create another price-fixing system which would be equally illegal.*

That the court below would go to such extremes to preserve the blanket license is, we submit, the conclusive demonstration that this form of license may not be deemed *per se* illegal.

* Query how the per use system to be created would solve the problems of past "misuse."

CONCLUSION

The decision below substitutes theory for contrary and carefully-adjudicated fact. On that basis, it proclaims a scope for the doctrine of *per se* illegality never before seen or even hinted at.

To avoid the problems thus threatening music licensing, the court below then causes even greater problems for antitrust enforcement and judicial administration by creating the "market necessity" defense.

If one were to grant the majority below its basic premise —that it is "price-fixing" for ASCAP to accede to the request of the CBS television network for a blanket license—what follows may have a certain inevitability.

We submit, however, that the proper course is to go back to the starting point: the ASCAP blanket license is not "price-fixing." If it is to be appraised at all in a court of law, it should be tested by the rule of reason. It has been so tested by the trial court and found to pass the test. The Court of Appeals did not disturb those findings.

We ask, in consequence, that the decision appealed from be reversed, and the order of the District Court dismissing the complaint be reinstated.

Respectfully submitted,

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